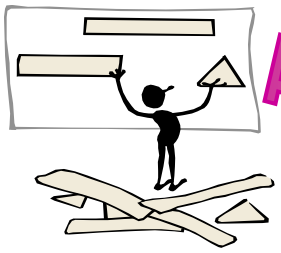
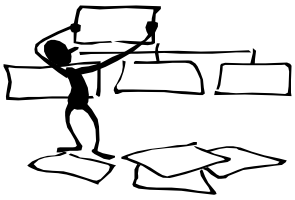


CHAPTER 4
OVERVIEW OF THE ACQUISITION PROCESS



1. LEARNING OBJECTIVES

Students should be able to describe in general terms, the COR's role in the acquisition process, in each of the planning, preaward and administration phases. Students will apply some of the learning concepts of this chapter in classroom exercises, and in the examination at the end of this course.

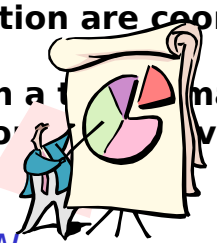
2. INTRODUCTION

This segment will provide a brief overview of the complete acquisition process as a general foundation for comprehending subsequent learning segments. It will break the acquisition process out into three main sections, discussing each and their relationship to the whole.

3. DEFINITIONS

a. "Acquisition" means the acquiring by contract with appropriated funds of supplies or services (including constructions) by and for the use of the Federal U. S. Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated or evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical management functions directly related to the process of fulfilling agency needs by contract. [FAR 2.101]

b. "Acquisition planning" means the process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a t manner and at a reasonable cost. It includes develo verall strategy for managing the acquisition. [FAR 7.10



4. ACQUISITION OVERVIEW

The three phases of the acquisition process are *"Acquisition

ACQUISITION PROCESS

ACQUISITION PLANNING

(Requiring Activity/Functional Organization)

Requirement Procurement Determination Request

Requirement Statement of Work

CONTRACTING

(Contracting Office)

Selection Solicitation of Source

Evaluation Award

Sealed Bidding

Negotiation

CONTRACT ADMINISTRATION

(Administrative Contracting Office)

Completion

Contract Assignment Modification

Payment Compliance Closeout

Delivery &

FIGURE 9

1. ACQUISITION PLANNING is the responsibility of the Requiring Activity (RA) or functional proponent that has the need for the contract. This is not to imply that other individuals or organizations do not bear responsibility for participating in planning. It merely means the RA takes the lead and usually makes overall mission decisions. The planning team should include when appropriate, and is not limited to, mission and technical specialists and designers, estimators, budget officers, contracting officers, legal counsel, safety officer, environmental officer, security officers, CORs and other relevant specialists. FAR Part 7.102 addresses acquisition planning, and mandates that agencies perform acquisition planning and conduct market research acquisitions in order to promote and provide for the acquisition of commercial items. More in depth coverage of "commercial item" acquisition will be included in an upcoming chapter on Describing the Requirement in Part II.

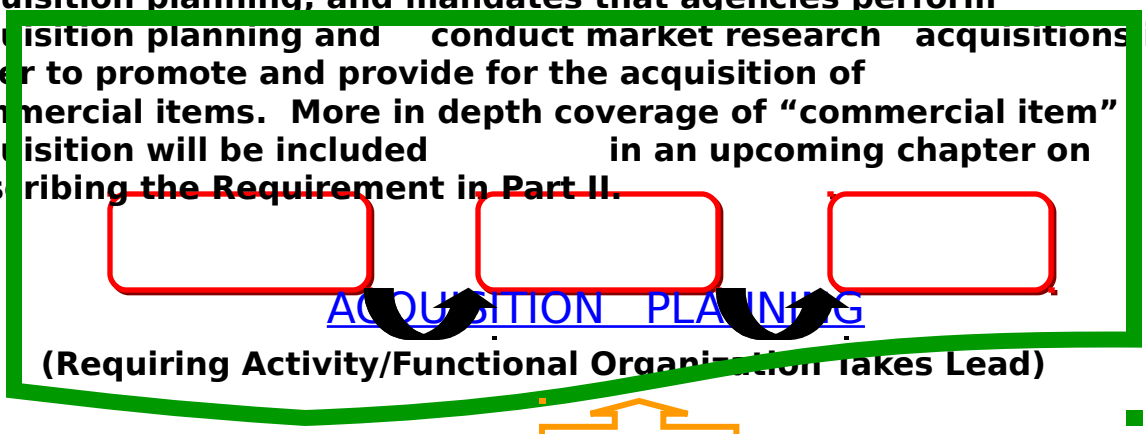


FIGURE 10

2. CONTRACTING means purchasing, renting, leasing or otherwise obtaining supplies or services from nonfederal sources. Contracting includes a description of supplies and services required, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration. It does not include making grants or cooperative agreements. FAR 2.101(h). The two most critical elements of the process of awarding contracts are the development of the description of the work to be performed, or the work statement, specifications, definition, and, the evaluation criteria, before and after award. After receipt of a legal and acceptable requirements definition package, the contracting office will begin contracting process. The following comments only briefly on highlights of key segments of the contracting process:

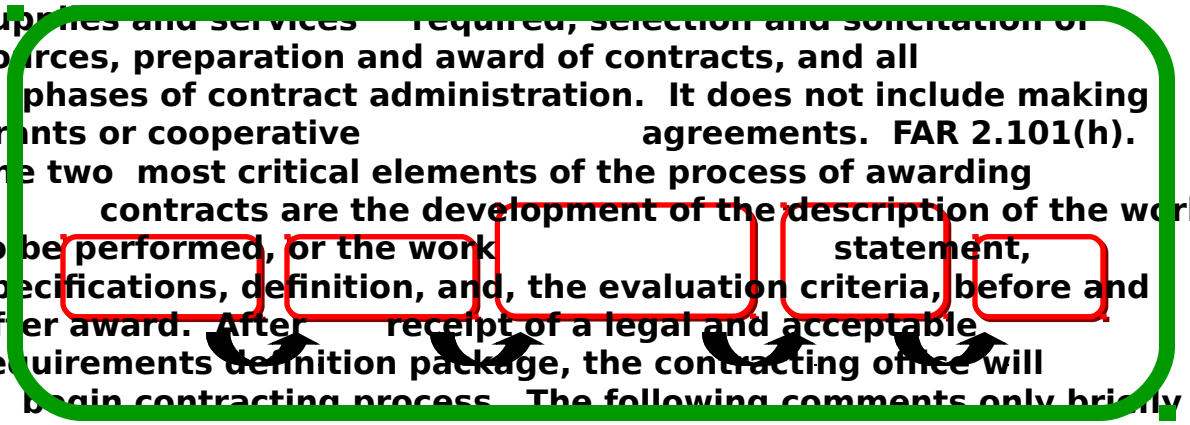


FIGURE 11

a. THE SOLICITATION **defines the U. S. Government's requirements to all interested prospective contractors, and requests pricing and other award criteria be provided with responses. Ideally, it includes everything bidders/offerors will need to know to provide prices to the U. S. Government. The awarded contract will generally mirror the solicitation as amended, (except that instructions for bidding and related sections may not be distributed with the contract, as these are not generally needed after award. They do, however, remain a part of the official file and the awarded contract..) Contracting Officers prepare solicitations based on their interpretation of the requirements package, submitted by the requiring activity that has the need (mission) for the contract. Two initial decisions hinge on this analysis: "Type of Contract", cost or fixed price; and the "Method of Acquisition", sealed bid or negotiation.**

b. EVALUATION **of bids/offers received must be in accordance with the terms of the solicitation, laws, regulations policies, and procedures appropriate to the type of contract and method of acquisition. If technical evaluation is required, U. S. Government technical representatives may participate in the evaluation process, or this may be contracted out to a firm with appropriate technical expertise. CORs may be asked to participate in the evaluation process where technical issues are critical during performance. Contracting Officers are responsible for evaluating and deciding on price reasonableness. The sound, "Independent U. S. Government Estimate (IGE)" is a critical element of that evaluation.**

c. SIMPLIFIED ACQUISITIONS, SEALED BIDDING, OR CONTRACTING BY NEGOTIATION **are the three basic methods of acquiring the U. S. Government's needs:**

(1) SIMPLIFIED ACQUISITION PROCEDURE **is for transactions $100,000 and under. This type of acquisition is intended to ease administrative burden and buy issuing methods. Special regulatory guidance is provided in FAR Part 13. We will not discuss simplified acquisition during this course as CORs are not generally required for such purchases. Simplified Acquisition Procedure (SAP) includes use of "external" acquisition methods. This means transactions may be performed by U. S. Government employees working in the functional organization requiring the supplies and/or services. Frequently used are Blanket Purchase Agreement (BPA) "call" and Imprest Fund reimbursement**

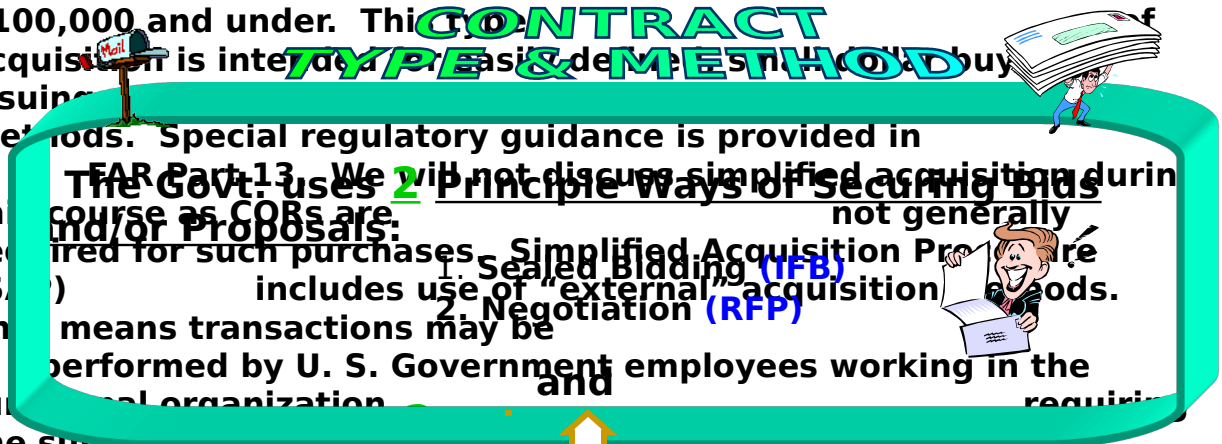
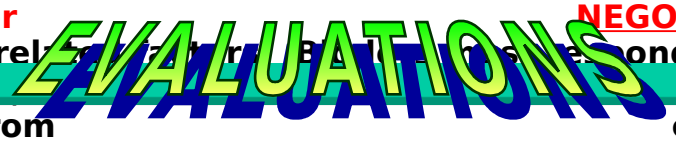

CONTRACT TYPE & METHOD
The Govt. uses 2 Principle Ways of Securing Bids and/or Proposals:
1. Sealed Bidding (IFB)
2. Negotiation (RFP)

FIGURE 12

(2) SEALED BIDDING is when the U. S. Government puts their requirement forward as an "Information for Bids (IFB)" advertisement, and states evaluation and award process will be by sealed bidding procedures. Sealed bidding procedures are rigid and primarily based on statutory mandates. Bid openings are precise as to procedure and open to the public. Sealed bids must be evaluated WITHOUT DISCUSSIONS, or NEGOTIATIONS, on any clarification of a Bid. Bids that do not conform to the IFB, as to be eliminated from consideration for award.



- Bids (IFB) must be Responsive to terms stated in the solicitation. Nonconforming bids are rejected.
- Responsibility Determination on all contracts/mods awards.
- Technical evaluation (when required).
- Price & Cost evaluation (when required).

FIGURE 13

(3) NEGOTIATION is a procedure that includes the receipt of proposals from offerors, permits bargaining, and usually affords offerors an opportunity to revise their offers before award. Bargaining in the sense of discussion, persuasion, alteration of initial assumptions and positions, and give and take, may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. FAR 15.102 Negotiation applies when the U. S. Government puts their requirement forward as a "Request for Proposal (RFP)" indicating the intent to enter into discussions rather than hold a public sealed bid opening. The Negotiation method is designed to be flexible and permit discussions with offerors. Negotiation is used when there are uncertainties that need to be resolved through discussions.

f. SELECTION OF SOURCE/DETERMINATION OF RESPONSIBILITY

To be eligible for award of a contract, the bidder or offeror must be determined to be "responsible", or capable of actually performing the contract. The

3. CONTRACT ADMINISTRATION **includes everything from contract award, through completion and payment. It encompasses performance by the contractor through completion, and U. S. Government surveillance of the contractor's performance as by contract terms and conditions.**

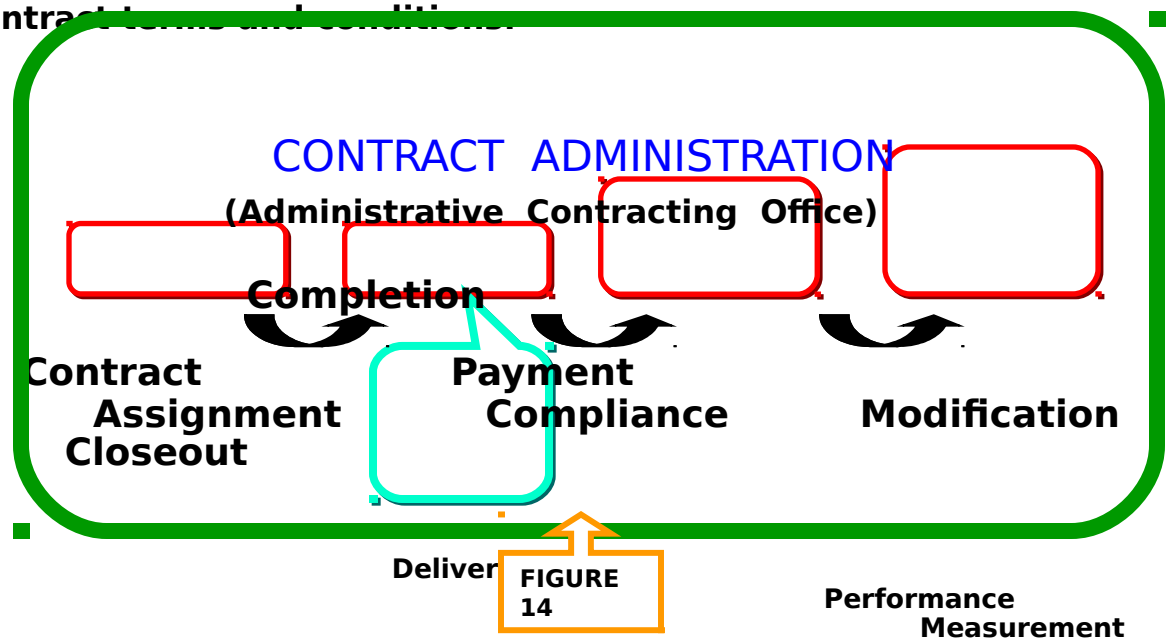


FIGURE 14

a. ASSIGNMENT **FAR 42.302 cites 68 Contract Administration functions. The Contracting Officer who awards a contract must decide if they will retain full responsibility for contract administration, or will partially or fully "assign" them to another contracting officer who becomes the "Administrative Contracting Officer (ACO)". This is generally done to: (a) put the contract administration team close to where the contractor's performance will take place; (b) to have a specialized contract administration team; and sometimes to keep the people in contracting dedicated to awarding contracts.**

b. COMPLIANCE **is ensuring contractor delivery and/ or performance are in compliance with the terms and conditions of the contract. CORs may have aid from others in reviewing and documenting contractor performance, but, they are not permitted to re-delegate their acquisition authority. More on authority, compliance and performance measurement in later learning segments.**

c. DELIVERY/PERFORMANCE MEASUREMENT

In order to ensure compliance, there must be some formal plan for measuring and documenting contractor delivery/performance, and corrective actions taken. Compliance and

d. MODIFICATIONS

From time to time it may become necessary to change some term or condition of the contract. This function is reserved for contracting officers. CORs are not permitted to alter the contract in any way. They may, however, request the Contracting Officer to change the contract, providing rationale. The Contracting Officer will decide if the requested change is "within the scope of the contract". If it is determined not to be within the scope, no modification can be made. The change will have to be treated as a new requirement. More in a later segment on modifications.

e. COMPLETION/PAYMENTS **are included in CORs responsibilities. CORs are often the individuals who perform acceptance on behalf of the U. S. Government. In USAREUR, CORs are often assigned authority to certify invoices for payment. QARs/inspectors may provide CORs with documentation evidencing receipt of acceptable performance, or indicating that performance has not been accomplished, but they do not have authority to approve invoices or accept the performance, unless they are expressly given authority to do so by the Contracting Officer. Final acceptance and payment records must be evidenced on completion documents executed by the Contracting Officer before closing contract files.**

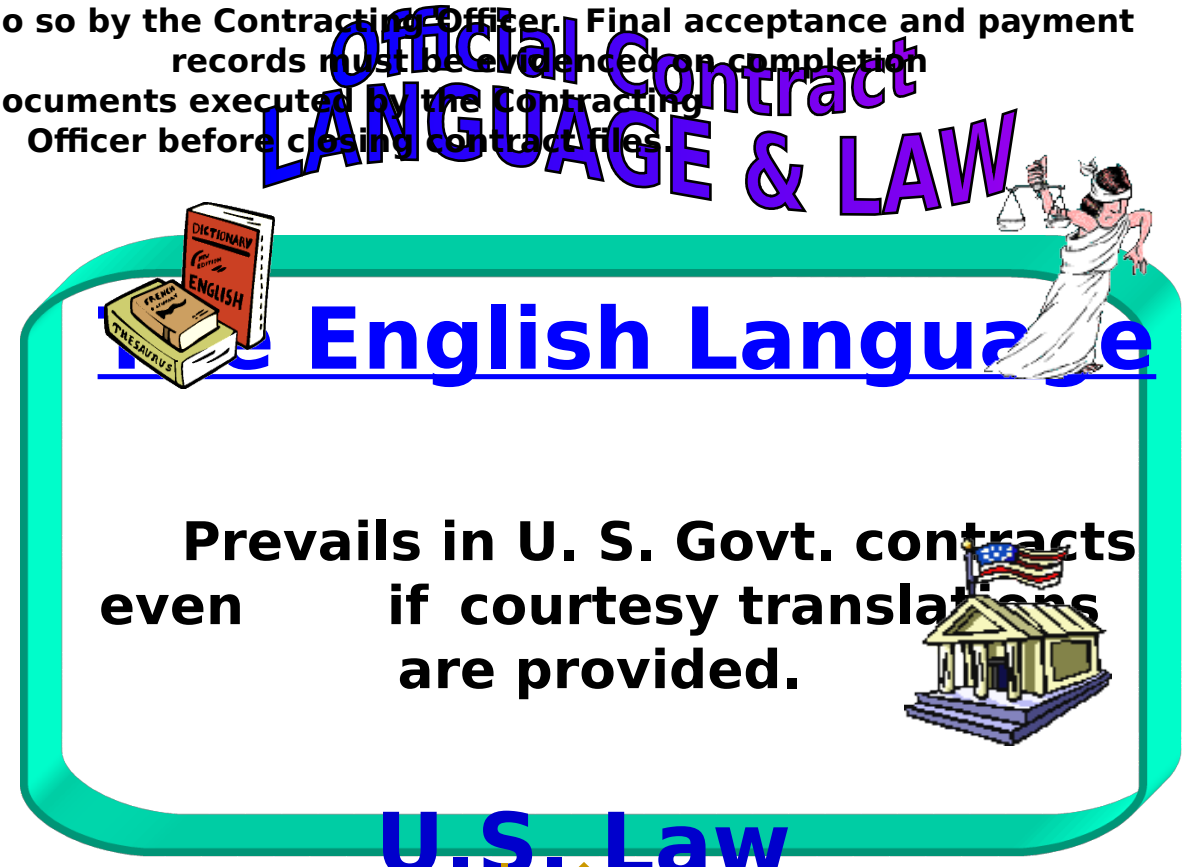


FIGURE 15

CHAPTER 5
ACQUISITION AUTHORITY DELEGATION

1. LEARNING OBJECTIVES

a. Upon completion of this chapter, students should be able to identify the source of U.S. U. S. Government contracting authority, how it is delegated, the Contracting Officer, and the COR/QAR/inspector relationship. Students must be able to explain: (a) who has contractual authority; (b) what are the limits on the COR related to acquisition authority; and (c) where their organization's chain of command fits into the picture. Students must be able to relate the process of contractual authority delegation or acquisition authority, by demonstrating in participatory exercises and examinations.

b. This chapter begins to lay groundwork for the underlying principle of "sovereign" authority and "sovereign" rights of the U. S. Government that will be expanded in subsequent chapters of this training. At the completion of this chapter, students must be able to relate the issue of sovereignty to delegation or acquisition authority, by demonstrating in participatory exercises and the examination at the end of the course.

2. INTRODUCTION

a. Our purpose in this chapter is to familiarize students with the origins of contractual authority in the U.S. U. S. Government and the delegation cycle. As Contracting Officer's Representatives (CORs), it is vital that students understand the authority designated to them. The source of a COR's authority is a Contracting Officer. As "special agents" of the U. S. Government, CORs have limits on their authority. This will be explained more fully later in this chapter.

b. CORs are responsible for any QARS/inspectors assisting them in the performance of their contractual surveillance. CORs must insure they also know what authority is reserved for Contracting Officers, or what is beyond the CORs authority and must be done by the Contracting Officer.

c. There is no stereotypical COR. COR duties may be a full time job, or they may be in addition to other

FIGURE 16

3. HISTORICAL OVERVIEW

a. The first step in understanding the authority of a COR is to trace the history of U. S. Government contracting. It begins with the U.S. Constitution and continues to this day, as Congress is still enacting laws which have an effect on the acquisition process.

b. While there is no specific language in the Constitution addressing the U. S. Government's right to acquire what is needed to run the U. S. Government; it is inherent in the concept of sovereignty. The United States U. S. Government is a "sovereign" entity charged with the performance of public duties. In order to discharge its obligations, a formal acquisition process is not only proper, but is necessary. Since the U. S. Government is one of delegated powers, the right to contract on behalf of the Government is limited in scope to the authority delegated.

c. The delegation process begins with the President of the United States, who as the Chief Executive Officer inherits the responsibility. Again, there is no specific language in the oath of office addressing acquisition authority, it is inherent in the office. This authority is in general and implied powers in the Constitution. The Supreme Court has held that the Constitution gives the Federal Government inherent power based on sovereignty to enter

5. OVERVIEW OF KEY ACQUISITION POSITIONS OF AUTHORITY

a. PROCUREMENT EXECUTIVE

(1) Executive Order 12352 of 17 March 1982, titles "Federal Procurement Reforms", provides as follows: "To make Procurement more effective in support of mission accomplishments, the heads of executive agencies engaged in the procurement of products and services from the private sector shall: Designate a Procurement Executive with agency-wide responsibility to:

(a) oversee development of the procurement systems,

(b) evaluate system performance,

(c) enhance career management of procurement work force,

(d) certify to agency head that procurement systems meet designated approved criteria."

(2) The Procurement Executive is delegated authority from the agency head. The Procurement Executive authority includes:

(a) responsibility for the establishment and organizational placement of acquisition activities;

(b) prescribe and publish agency procurement policies, regulations 7 procedures;

(c) enter into, make determinations and decisions, and take other actions, consistent with appropriate policies, regulations and procedures regarding purchases, contracts, leases, sales agreements and other transactions, except those required by law or regulation to be made by other authority;

(d) Establish clear lines of contracting authority;

(e) Exercise priorities authority in accordance with the Defense Production Act of 1950;

(f) Manage and enhance career development of the acquisition work force;

(g) Examine the acquisition system for improvements in accordance with the Office of Procurement Policy ");

(h) Develop a unique standa

(i) Be the Competition Advocate;

b. HEADS OF THE CONTRACTING ACTIVITIES (HC

(2)The HCA is delegated acquisition authority by the Assistant Secretary of the Army, Research, Development and Acquisition (SARDA). The HCA is the highest level of acquisition approval in USAREUR.

(3)AFARS 5101-601 outlines the specific responsibilities of the HCA. They include ensuring activity acquisition compliance with laws, regulations and procedures; ensuring adequacy of acquisition structure, staffing and training; establishing the Office of the Principal Assistant Responsible for Contracting (PARC) to carry out delegable responsibilities of the HCA.

c. PRINCIPAL ASSISTANT RESPONSIBLE FOR CONTRACTING (PARC)

(1) The HCA establishes the office of the PARC and delegates acquisition authority to the head of the acquisition functional organization. In USAREUR, the PARC is collateral duty/title for the Commander of the U.S. Army Contracting Command, Europe (USACCE).

(2)The PARC is responsible for:

(a) advising the HCA on any/all acquisition matters;

(b)establishing acquisition policy for USAREUR, and interprets higher levels of policy, regulations and laws;

(c) delegating appropriate contractual authority to contracting officers through the issuing of warrants;

(d) conducting annual oversight and Performance Management Reviews (PMRs) of all USACCE and NAF contracting offices' performance, ensuring compliance with all pertinent laws, regulations policies and procedures;

(e) ensuring maximum competition is achieved in the acquisition of USAREUR's needs; and

(f) periodic status reporting and significant activities to the HCA.

d. CONTRACTING OFFICERS

(1) the U. S. Government conducts business through authorized agents called "Contracting Officers" (CO). In the Army, COs receive their delegation of authority from the PARC. The selection criteria for a contracting officer are addres 1.603-2. In selecting a contracting nsideration is given to experience, training, education, business acumen, judgment, eputation and ethics.

(2)FAR 1.603-3 prescrib s shall be appointed in writing on a "Certificate of Appointment," SF 1402. This document is commonly referred to as a "warrant". The

(4) As COR, you may be interacting with more than one type of CO. The general category encompassing any acquisition professional so designated who holds a warrant. The title of Contracting Officer can refer to:

(a) The COs are the Contracting Officers who plan, solicit, and award contracts, and can retain authority to administer those contracts, or delegate that portion of contract management to another CO.

(b) When the CO retains the authority to administer contracts this is sometimes referred to as "cradle-to-grave" contracting (meaning the COs begin their responsibility with planning, and stay with it through completion and final closeout.) This approach is usually used when Integrated Process/Project Teams (IPTs) are established for the requirement.

(5) This may seem confusing, but now that you have this information you will find yourself better equipped to determine the difference between the various COs with whom you may be interacting. For the purposes of this course, you will need to consider the context of the material to determine whether the use of CO is a generic term, or specific to one contracting area.

(6) For the most part, in the non-generic use, the CO *(often commonly referred to as the KO)* will mean the individual who awards contracts.

(7) Today, USACCE CONTRACTING OFFICES are primarily performing as IPTs using the "cradle-to-grave" contracting approach. This means one team with members coming from, and representing the pertinent disciplines, remain with the contract from the beginning of planning all the way through completion of performance by the contractor and closeout. Team decisions are generally made conjointly with the perspectives of each discipline represented having reviewed and commented on the issues. The awarding contracting officer retains authority and responsibility for the contract throughout the acquisition process.

(8) Sometimes the contracting functions are divided into two specialized areas of performance. The Contracting Branch includes Contract Specialists (CS) who prepare solicitations and generally work contracts up to the point of award, and COs who award contracts.

(9) After contract award, the contract may be assigned to a contract administration

e. CONTRACTING OFFICER'S REPRESENTATIVES (COR)

(1) FAR authorizes representatives of the Contracting Officers, though it does not specifically address technical monitoring or designate such representatives as Contracting Officer's Representatives (CORs). **The DFARS, however, states contracting officers may designate qualified personnel as their authorized representatives to assist in the technical monitoring/administration of a contract. The DFARS designates such individuals as** CORs.

(2) DFARS 201.602-2 stipulates a COR:

(a) Must be a U. S. Government employee;

(b) Must be qualified by training and experience commensurate with the responsibilities to be delegated;

(c) [illegible] at a contractor's location that have been delegated to the contract administration office;

(d)

FIGURE 14

FIGURE 17

(3) CORs **are technical subject matter experts (SME) or specialists in a specific technical arena.** CORs **have a key role in the government quality assurance program and the successful accomplishment of the technical mission.**

(4) CORs **advise contracting officers on technical details, mission requirements, research technical problems and and recommend solutions.** CORs **monitor contractor compliance and help administer specific assigned contracts. CORs typically monitor**

COR MEMORANDUM OF DESIGNATION OF AUTHORITY

As a minimum it will include:

1. Names of COR & Contracting Officer.
2. Contract Number.
3. Areas of Authority/Responsibility.
4. *Specific Limitations on Authority.*
5. Ethics and Standards of Conduct.
6. Notice of any alternates/assistants.
7. *Requirement to acknowledge/accept.*

FIGURE 18

Contracting Officers may:

1. Appoint *Alternate CORs;*

or

2. Designate *more than one COR* **for a single contract when necessary to ensure continuity of operations;**

or

3. When the contract schedule provides for performance at more than work site and *one COR cannot handle all sites;*

and

4. Appointment letters shall clearly identify all worksites for which each *COR* is responsible;

or

5. State that an alternate is authorized to act in the

FIGURE 19

f. QUALITY ASSURANCE REPRESENTATIVES (QARs)

(1) QAR Requirements**:**

QARs **must be fully qualified to meet the major responsibilities of the position:**

(a) Maintain complete and accurate documentation;

(b) Maintain a good relationship with the contractor; and

(c) Maintain thorough knowledge of the contract requirements.

(d) Experience and training are essential for effective surveillance.

(2) USAREUR **Regulation 715-2 subpart 2.1 defines a Quality Assurance Representative** QARs **as: "An individual from a requiring activity appointed in writing by a** CO **or** COR **(if specifically authorized by the contracting officer) using a letter similar to that in AFARS, appendix BB, for service contracts over $25,000. The** QAR **is a functionally qualified person who performs quality assurance functions for contracted services.**

(3) QARs **must have technical knowledge and experience in the area to be contracted, sufficient enough to permit them to observe contractor performance and determine whether the performance does or does not meet contract standards.** QARs **should have enough retainability to perform surveillance until contract completion.**

(4) The QAR **may not hold discussions or initiate correspondence with a contractor except to verify compliance with contract quality control provisions. The** QAR **receives technical supervision for quality assurance matters from the** CO **or** COR **(if authorized)."**

(5) QARs **and inspectors assist the** CORs **in contractor performance measurement.** QARs **are generally** NOT **delegated contractual authority, though, may b given specific authority to take corrective action with contractors. This is an exception to the rule, and shall be given only on certain types of contracts when the** CO **decides it is in the best interest of the Government to do so.** QARs**/inspector's primary role is to review contractors' performance and document their findings.** QARs**/ inspectors do not have authority:**

(a) to interpret the technical terms of the contract to the contractor;

(b) to accept contractors' work on behalf of the U. S. Government; or

CHAPTER 6 CONTRACT AGENCY LAW

1. LEARNING OBJECTIVES

a. To successfully perform COR duties, students need to identify agents of the contracting parties, determine the level of their authority to bind the parties, and to differentiate between agents, independent contractors (prime) and subcontractors. This chapter will provide students with a basic understanding of the pertinent principles of contract law and agency law, and their importance and impact on U. S. Government contracting.

b. Students will become familiar with the legal relevance of contracting parties' actions, the rules of agency, limits on authority, and how these impact conduct and interaction with contractors.

c. It is critical in performing interaction with contractors that CORs/inspectors are able to differentiate between "personal" and "non-personal" services contracts Avoid situations that may result in creating a personal services environment on a non personal services contract.

d. Students must demonstrate their knowledge of the subjects addressed in this chapter by deciding assigned case studies in interactive groups. Further, students must evidence in the examination at the end of this course, that they:

(1) recognize who in U. S. Government acquisition are agents of the U. S. Government;

(2) the limits on agent's authority;

(3) can differentiate between personal and non-personal services; and,

(4) recognize the potential consequences and reactions from inappropriate judgment in exercising COR authority.

2. INTRODUCTION

a. Our purpose in this unit of instruction is not to create lawyers, or legal experts, but rather to provide an awareness of the legal aspects of acquisit[illegible]ey relate to the principles of contract law. The com[illegible]orld is founded on the law of contracts. Private citizens as well as U. S. Governments enter into contracts every day. Just as the safety of persons and property depend on criminal law, so the security

c. Contracts are developed and entered into by people. People involved in U. S. Government contracts fall into one of three categories: "principal", "Agent" or "third party". From this division we can now progress to the next step in addressing the principles of law and the law of agency.

d. Next, we will see how the general rules of agency applicable in the commercial world differ from those applicable to the federal U. S. Government in its commercial transactions. Finally, we will see what happens when U. S. Government agents exceed their authority. In a later learning segment we will discuss what happens when U. S. Government employees without authority take improper actions that may result in a claim against the U. S. G

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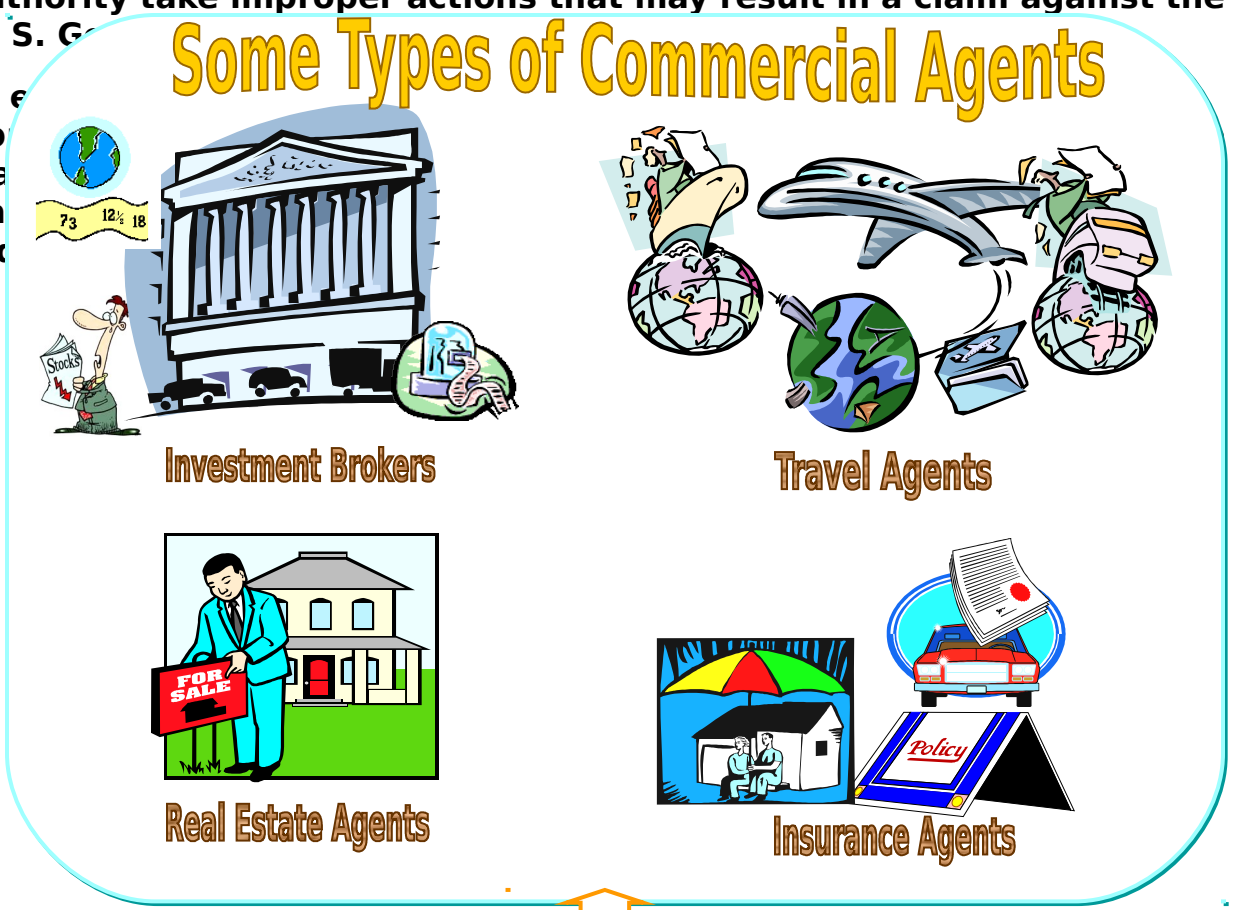


FIGURE 20

Chapter 6
Section A

ELEMENTS OF A CONTRACT or MODIFICATION

1. LEARNING OBJECTIVES

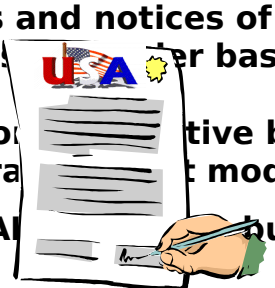
Upon completion of this chapter, students should be able to list the elements of a legal contract or modification, identify if the elements are present, and determine the legal impact of each element. Students will be required to demonstrate their learning in participatory exercises, and in the examination at the end of this course.

2. INTRODUCTION

In this chapter we will concentrate on the legal elements of a contract *or a* modification. To enable CORs to perform their duties successfully, they must become familiar with the basic principles of commercial as well as U. S. Government contract law related to the formation of a legal and "binding" agreements. Sovereign rights of the U. S. Government will be discussed again. This time, in relationship to the legal and binding obligation of the contracting parties. CORs do not make legal determinations on the rights/obligations of the parties to an agreement, but they will better understand decisions made by contracting officers. CORs frequently make recommendations to contracting officers on a variety of issues. Having this knowledge will provide you with a basis from which to formulate your recommendations.

3. DEFINITION

a. "Contract" means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the U. S. Government to an expenditure of appropriated funds and that, except as otherwise authorized are in writing. In addition to bilateral instruments, contracts include (but are no limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreement; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; bilateral contract modifications." FAR 2.101(h).



b. Above is the official FAR definition but an easier definition to remember might be: An agreement between two or more parties enforceable by law.

c. Contracts may be oral or written, with written always being

4. ELEMENTS OF A CONTRACT or MODIFICATION

For a contract to be legally binding, certain essential elements must be present. Five elements are essential to form a contract or modification, in both the commercial sector, or in U. S. Government acquisition. The five main elements are (1) offer, (2) acceptance, (3) consideration, (4) competent parties, (5) legal purpose, and clear terms and conditions. All must be present to have a legally binding accord.

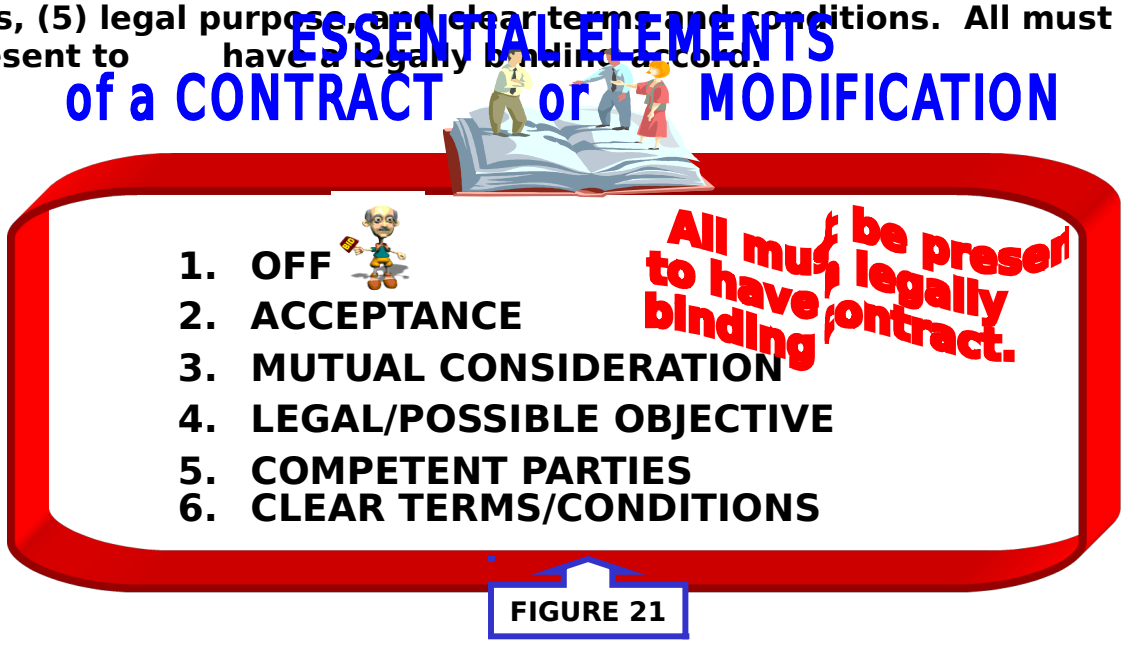


FIGURE 21

a. OFFER

(1) "Offer" means a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for bids (IFB) (sealed bidding) are offers called "bids" or "sealed bids"; responses to request for proposals (RFP) (negotiation) are offers called "proposals"; responses to request for quotations (RFQ) (negotiation) are not offers and are called "quotations". 2.101

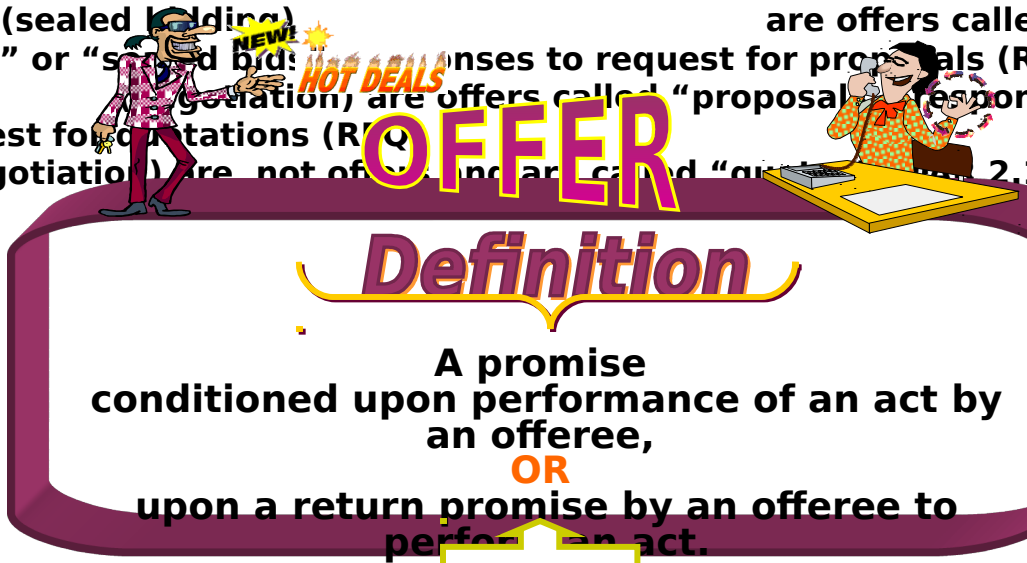


FIGURE 22

(2) An offer is a communication by one party to another party with an intent to enter into a binding agreement. It must be definite and exhibit a serious intent to be contractually bound . It is nothing more than a promise, conditioned upon performance of an act by the offeree or a return promise by the offeree to perform this act.

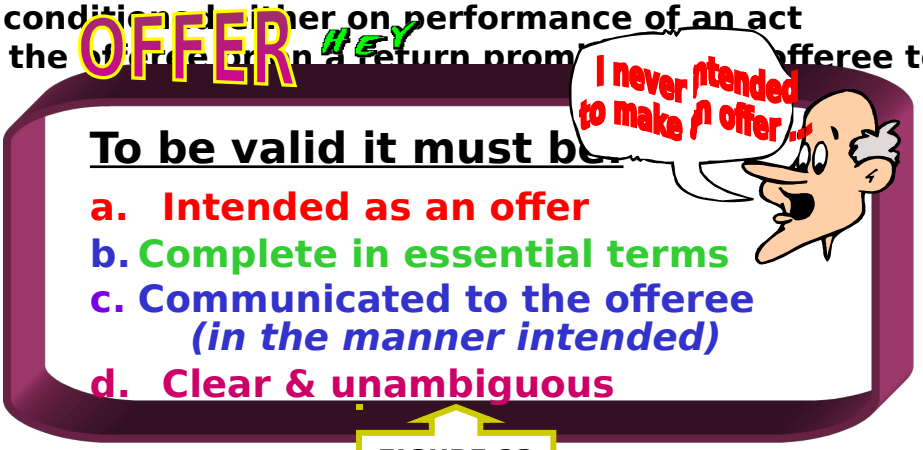

OFFER
I never intended to make an offer...!
To be valid it must be:
a. Intended as an offer
b. Complete in essential terms
c. Communicated to the offeree
(in the manner intended)
d. Clear & unambiguous

FIGURE 23

(3) It is important to differentiate between an advertisement and an offer. An advertisement is nothing more than a notice or publication. In using "sealed bidding" procedures, the Government advertises for prospective contractors to *submit offers* for specific supplies or services required.

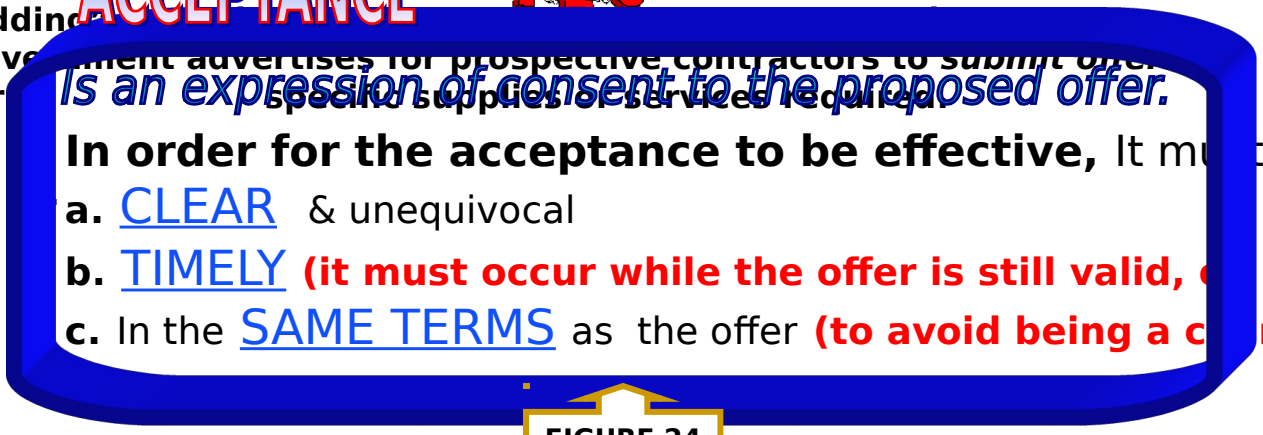

ACCEPTANCE
YES
Is an expression of consent to the proposed offer.
In order for the acceptance to be effective, It must be
a. CLEAR & unequivocal
b. TIMELY (it must occur while the offer is still valid,
c. In the SAME TERMS as the offer (to avoid being a counte

FIGURE 24

(1) If the acceptance conditions or alters any of the terms of the offer, a counteroffer results. Once a counteroffer is made, the original offer is terminated and the offeror then has the power of accepting or rejecting the counteroffer. In U. S. Government contracting, *sealed bidding procedures,* the offer/counteroffer is not used. An offer must be made in *strict* accordance with the terms and

c.

CONSIDERATION ?

(1)

The Price Bargained & Paid For A Promise.
(Something of value changes hands.)

(a) It may consist of: a. an act,
b. forbearance of an act,
c. or a return promise.

(b) To be valid consideration must be legally sufficient and "MUTUAL

FIGURE 25

(2) All contracts and modifications must offer each of the contracting parties some form of consideration or benefit for their successful participation in the contract. Terms such as "unjust enrichment" refer to the lack of consideration to one of the parties. Stated differently, this means contracting parties cannot get "something for nothing". If one party [illegible] there is no contract, a gift. There is no balance of consideration when there was more prob[illegible]

COMPETENCY of the PARTIES

1. All parties to a contract must have the legal capacity to enter into a contract.

2. Incompetent Parties Rule:

INFANCY (under legal age to contract)

INSANITY

INTOXICATION

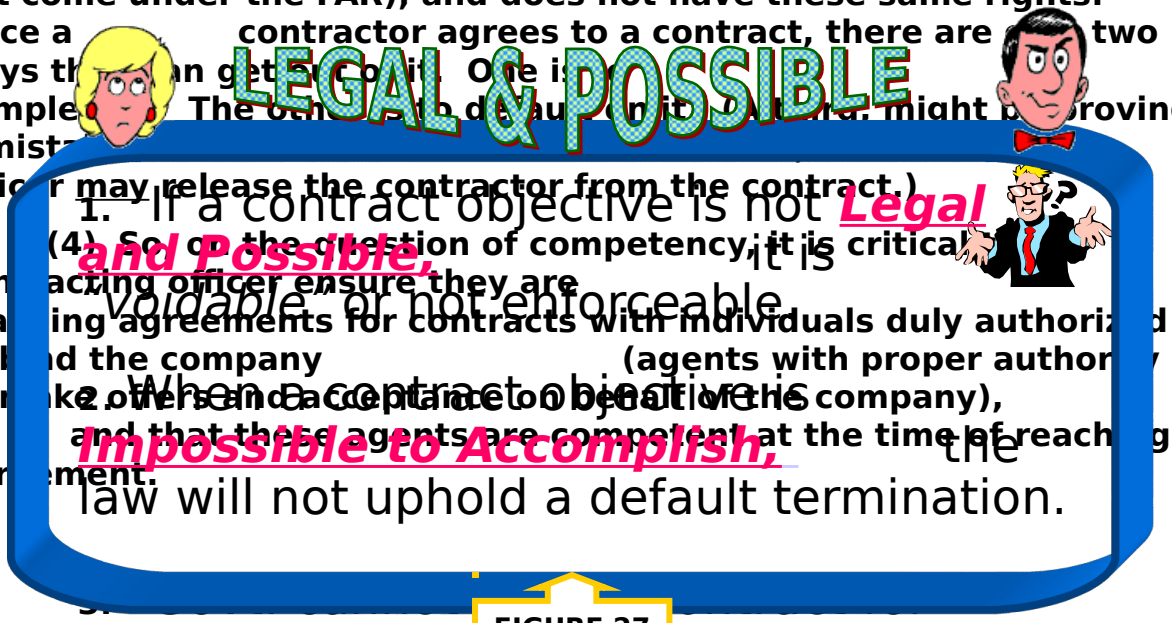
FIGURE 26

(1) An enforceable contract cannot be made by a party who has *no "Legal Capacity" to contract*. A question of competency may arise in contracts when one of the contracting parties has limited capacity to understand to what they are agreeing. The competency rule includes only three standards or gauges: infancy; insanity; and intoxication. Examples of people not considered to have legal capacity to contract are minors (children under the legal age to be held responsible for their actions), persons under the influence, and insane persons. As stated previously, the burden of

(2) This text previously discussed "sovereignty" and "sovereign rights of the U. S. Government". Here we reconsider the issue of sovereignty again, in relationship to competency of the parties. It is the sovereign right of the U. S. Government to terminate any contract for the Convenience of the U. S. Government (T4C) at any time it is decided it is in the U. S. Government's best interest to do so. This is so integral to U. S. Government contracting and sovereignty that the courts have decided it cannot be taken away by omission. More on this subject in a later segment on terminations.

(3) Termination for Convenience of the U. S. Government is not a right though of the contracting parties. Rather, the U. S. Government must draw on its sovereign powers as a government to cease spending tax money when it is determined there is no longer a need. The contractor is not a sovereignty (U. S. Government-to-U. S. Government agreements do not come under the FAR), and does not have these same rights. Once a contractor agrees to a contract, there are only two ways th[illegible]n get out of it. One is [illegible] completed. The other is to default [illegible]. A third might be proving a mist[illegible] officer may release the contractor from the contract.)

(4) So on the question of competency, it is critical the contracting officer ensure they are reading agreements for contracts with individuals duly authorized to bind the company (agents with proper authority to make offers and acceptance on behalf of the company), and that these agents are competent at the time of reaching agreement.


LEGAL & POSSIBLE
1. If a contract objective is not Legal and Possible, it is "Voidable" or not enforceable.
2. When a contract objective is Impossible to Accomplish, the law will not uphold a default termination.
FIGURE 27

anything that is ***Contrary to Any Condition of United States Law***.

1. CLEAR *enough for the courts to conclude that a contract agreement was intended.*
2. *Uncertainty concerning* **OFFER, ACCEPTANCE & CONSIDERATION,** *may render an agreement unenforceable or voidable.*

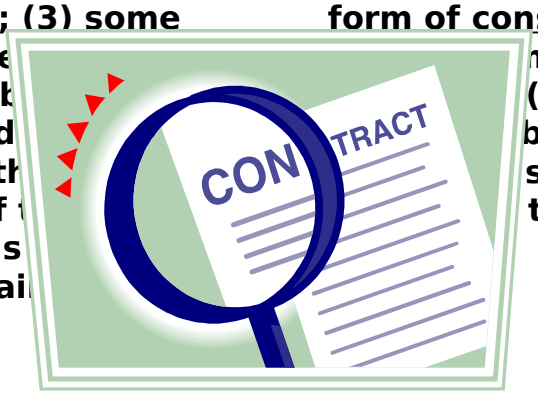
FIGURE 28

f. CLEAR TERMS AND CONDITIONS

It is essential that terms be clear enough to permit the courts to conclude that a contractual agreement was intended. A lack of certainty concerning offer, acceptance, or consideration may render the agreement unenforceable. The amount of work to be done, the price to be paid, or the service to be rendered may invalidate a contract. If terms are not clear enough, there may be instances where the parties will have totally different perceptions of what was agreed. In such instances, then they do not have an agreement, or the contract is voidable as there is no *"meeting of the minds"*. Both parties have to have had the same picture in their minds when they make the agreement, or there is no binding agreement and either party may disregard the contract. Later segments examine the other possible corrective actions that may be possible.

5. SUMMARY

Contracts and modifications to contracts will comprise of five elements: (1) an offer from the contractor in response to the U. S. Government's requests for offers; (2) an acceptance of an offer by the U. S. Government agent with authority to do so, the Contracting Officer; (3) some form of consideration (payment or other value) agre nust be competent to b (5) the objectives of the contract or mod be legal and possible. Contracts missing th subject to being voided if one of the agreement. The reason most cited is minds" on what the agreement entai



Chapter 6 Section B

AGENT, AGENCY, INDEPENDENT CONTRACTOR & PERSONAL SERVICES

1. AGENT AND AGENCY DEFINED

AGENT

A person authorized by another,
the Principal,
to act on behalf of
the Principal,
& subject to the control of
the Principal.

FIGURE 29

a. An agent is simply a person authorized by another, the PRINCIPAL, to act on behalf of the principal, and subject to the control of the PRINCIPAL. In U. S. Government contracts, the U. S. Government as an entity, is the PRINCIPAL. The agents are the contracting officer or administrative contracting Officer (ACO) and the CORs.

b. Generally, what people can do for themselves, they can appoint someone else to do for them. In some instances it is not only permissible for one to act for another, it may be absolutely necessary. This is true in situations where the PRINCIPAL is not a real person, but is either a corporation or a government entity. The role of the agent is important in forming contracts.

2. AUTHORITY OF THE AGENT

a. The link that binds third parties to the PRINCIPAL is "authority". Authority is the power of the agent to effect the legal relationships of the PRINCIPAL by acts done in accordance with the principal's delegation of consent to the agent. The agent is generally authorized to conduct transactions for the principal with third parties.

b. Agents are classified as "general" or "special". A general agent is authorized to conduct a series of transactions for the principal, involving continuous service. A general agent is in essence given "blanket" authority as to a particular activity, or series of transactions. Such a general agent has authority to do practically any act the principal could do in regard to that particular series of transactions delegated.

c. A special agent is authorized only to conduct a single type of transaction not involving continuity of service. A special agent's authority is limited. Special agents are given only limited authority to act. For example, the special

d. The "agency" is merely the relationship existing between the agent and the principal. The agency relationship is created when the principal authorizes the agent to perform some acts on behalf of the principal, and the agent agrees to do so, or the relationship is created when the principal authorizes agents to create, modify, interpret, surveil performance, or terminate contractual relationships between the principal and a third party (prime contractor).

e. No special formalities are necessary to create an agency relationship. A formal contract could be used, but it may be created by informal writings, by word of mouth, or even by conduct. Authority for the agency relationship rests on the consent of the two parties rather than on a contract.

f. U. S. Government contracting, authority must be in writing. U. S. Government contracting officers are appointed in writing by a Certificate of Appointment (SF 1402), commonly called a "warrant". CORs become limited agents of the U. S. Government by memorandum of designation from a contracting officer. The CORs authority is delegated by individual contract and expires with completion of the contract.

3. FIGURE 27 QUESTIONS

a. The Figure below is asking if there is *"privity"* between the parties shown in the diagram, the U. S. Government, and the contractor, through the actions of the government agents. What is your assessment?

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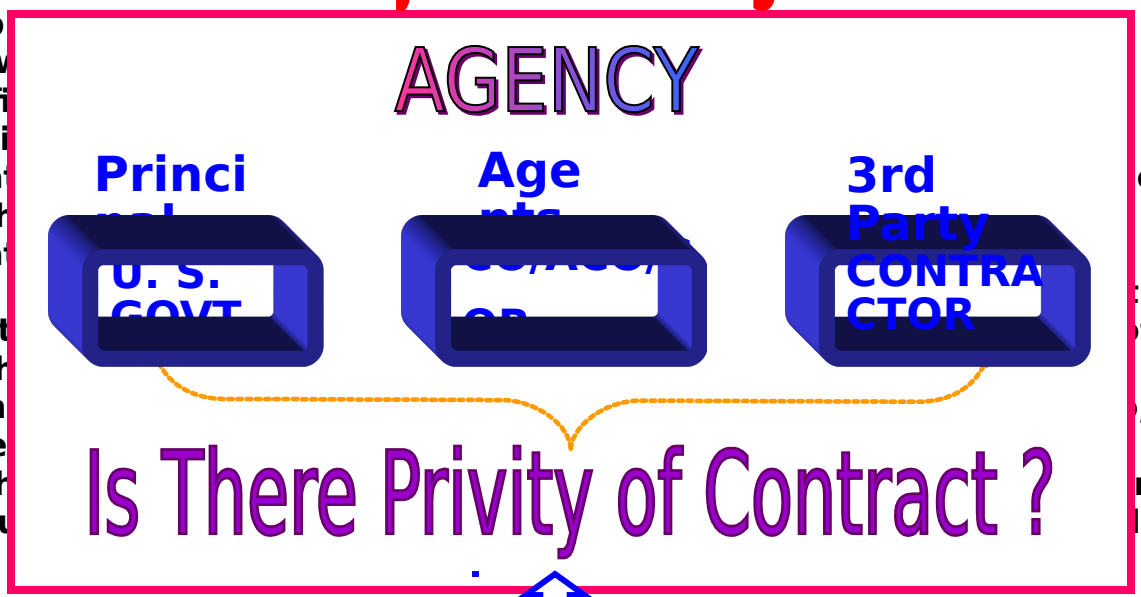


FIGURE 30

4. INDEPENDENT CONTRACTOR

a. In U. S. Government contracting, the third party is an **"independent contractor"**, generally referred to as the **"prime contractor"**. Independent contractors exercise independent resources and judgment. They contract to do work or provide products for a contracting party *(the principal)* according to their own *(Contractor's)* methods, without being subject to the control of *the principal* except to the result of the work. The independent contractor's function is to obtain or furnish supplies in compliance with the contract terms and conditions, but the manner and means

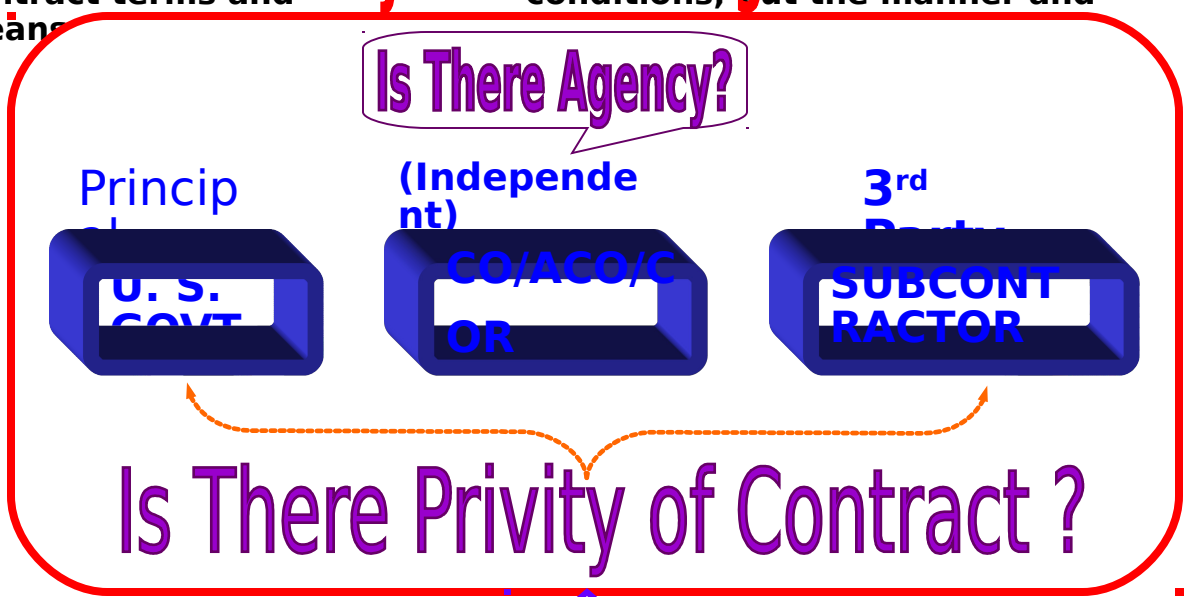


FIGURE 31

b. The independent contractor has no power to represent the principal or otherwise act for it. They are not agents of the U. S. Government.

5. PERSONAL vs. NONPERSONAL SERVICES (104/104)

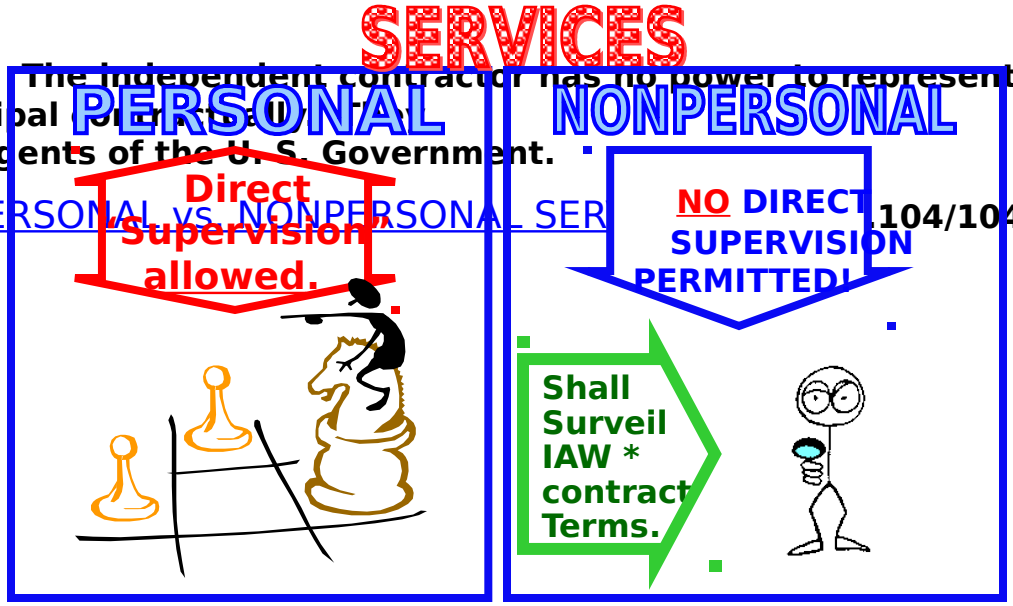


FIGURE 32

a. **"Non-Personal Services Contract" means a contract under which the personnel rendering services are not subject, either by contract terms, or by the manner of its administration, to the supervision and control usually prevailing in relationships between the U. S. Government and its employees.**

b. **"Personal Services Contract" means a contract that by its express terms, or as administered, makes contractor personnel appear, in effect, to be U. S. Government employees. A personal services contract is characterized by the "employer-employee relationship" it creates between the U. S. Government and contractor's personnel.**

c. **The U. S. Government is normally required to acquire its employees by direct hire competitive appointment or other procedures required by civil service laws. Obtaining personal services by contract rather than by direct hire, circumvents those laws unless congress has specifically authorized acquisition of the personal services by contract. Agencies SHALL NOT award personal services contracts unless specifically authorized by statute.**

d. **An employer-employee relationship under a service contract occurs when, as a result of the contract's terms or the manner of its administration during performance, contractor personnel are subject to the relative a U. order fo th the righ of nt contract employe**

The manner in which non-personal services contracts are administered by U. S. Government personnel, can be interpreted to be Personal Services if the U. S. Government personnel take on the role of direct supervision of contractor personnel, or subcontractors.

FIGURE 33

Chapter 6 Section C

TYPES OF AUTHORITY

"Agencies" or authorities, are usually classified as:

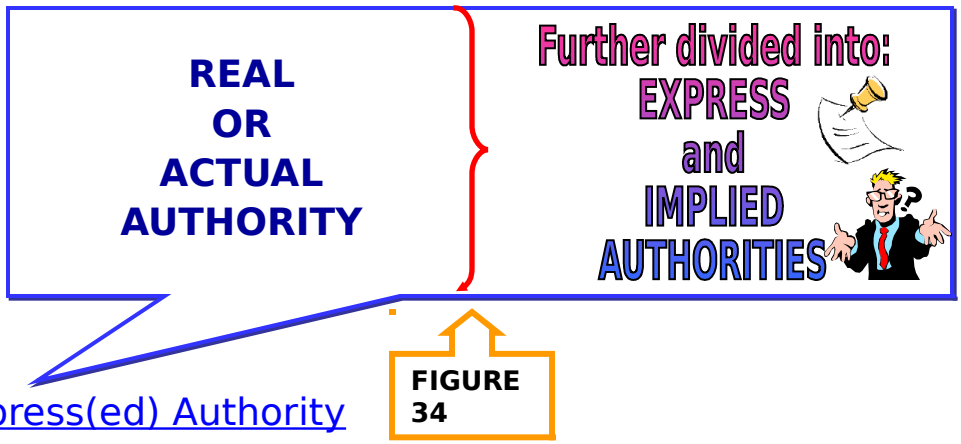


FIGURE 34

1. Express(ed) Authority

a. Express agency or authority, as the name implies, is formed by language either in writing or orally. The appointing document of an agent is an example of expressed actual authority. Agency formed by oral words is as binding as one formed by writing, but it is sometimes harder to prove. In the U. S. Government, agents' authorities are given in writing.

b. Actual authority extends no further than the principal's oral or written delegation or designation to the agent. What is stated in the delegation or designation is considered expressed authority contracting officer's warrant and a COR's memorandum of designation are express authorities. QARs are not generally delegated authority, though may have some written document assigning duties.

2. Implied Authority:

a The second type of actual agency or authority is that which is implied. There have been various interpretations of implied authority. Sometimes it is intended to mean "incidental " authority. It is that which is implied although not expressly given to an agent, yet is necessary to accomplish the tasks assigned, or is incidental to what is essly stated. It frequently happens that gned a task to accomplish tails of accomplishment are not spelled out in th express authority given.

c. In other occasions, implied authority is that which is supplied by conduct rather than by expression. If a principal does not take the necessary actions to prevent their agents from exceeding their authority, the actions, or inactions, may legally be interpreted to have created authority in the agent to act for them. This is commonly referred to as *"implied-in-fact"* authority, or an implied-in-fact contract.

3. By Operation Of Law

a. Agency or authority *"by operation of law"* occurs where the principal hasn't actually given an agent authority, but the authority has been created in the agent by some statute (law) or rule of common law.

b. It may happen that the legislature creates authority, but in order for this authority to actually be implemented, regulations or directives must be published. In such instances, agents acting within the scope of their authority under the law, can bind the principal without the implementing regulations or rules.

4. Apparent Authority

a. The word apparent stems from the word appear. The implication then of this type of authority, is that the individual who conducted the transaction may have appeared to have authority to affect the transaction, but did not have actual authority or agency to do so.

b. Apparent agency or authority *is not a real or actual authority*. It is the creation of authority based upon equity. The agency formed is effective only between the principal and the third party, not between the principal and the agent. This authority is supplied after-the-fact. The only purpose in finding such an authority is to prevent unjust consequences from justified actions, or *"unjust enrichment"* of one party at the expense of the other. Apparent authority is often the basis for a determination of *"implied-in-fact"* authority or contract.

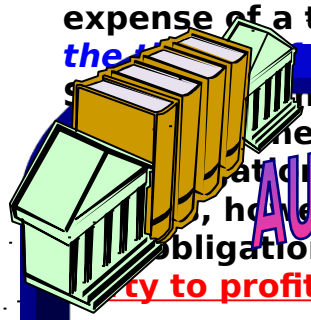
c. Apparent authority is created when the principal acts (or fails to act) in such a way that allows another to appear to be their agent. This *"Doctrine of Apparent Authority"* does not apply against the government. The basis for this position is that the U. S. Government provides express (written) authority to agents, and makes sure third parties (contractors) are aware of the limits on agents' authorities. We will see in a later subject, how the "*Doctrine of Constructive Change*" has been created to remedy legal questions and problems in this area.

5. LIABILITY OF PRINCIPAL FOR AGENTS' ACTS

a. The general rule is that principals are liable for the acts of their agents which are performed within the limits of the agent's actual or apparent authority. Stated conversely, principals are not liable when their agents exceed their actual or apparent authority. This rule, however, as it applies to the U. S. Government is not fully true.

b. As stated above, the Doctrine Of Apparent Authority does not apply against the U. S. Government. Accordingly, if government agents exceed their authority, the U. S. Government is not bound, not even by the theory of apparent authority. Of course, through the doctrine of "ratification", the U. S. Government may agree to be bound by such acts.

c. Even if the U. S. Government is not bound, if it has benefited by its agent's acts, at the expense of a third party, this party may be able to sue in court *(under the t* **to the extent the Government has benefited. The Doctrine of Quantum Merit** **is no contr** **at the party to the** **, however, in the nature of a contract imposed by c** **obligation is imposed because a court will not allo** **ty to profit at the expense of another.**



AUTHORITY BY OPERATION OF LAW

Created by some

Rule of Common Law"

and/or,

as decided by the courts in

"THE DOCTRINE of QUANTUM MERIT"

The courts will not allow one party to profit at the expense of another.

FIGURE 35

Chapter 6 Section D

UNAUTHORIZED COMMITMENTS, CONSTRUCTIVE CHANGES & RATIFICATIONS

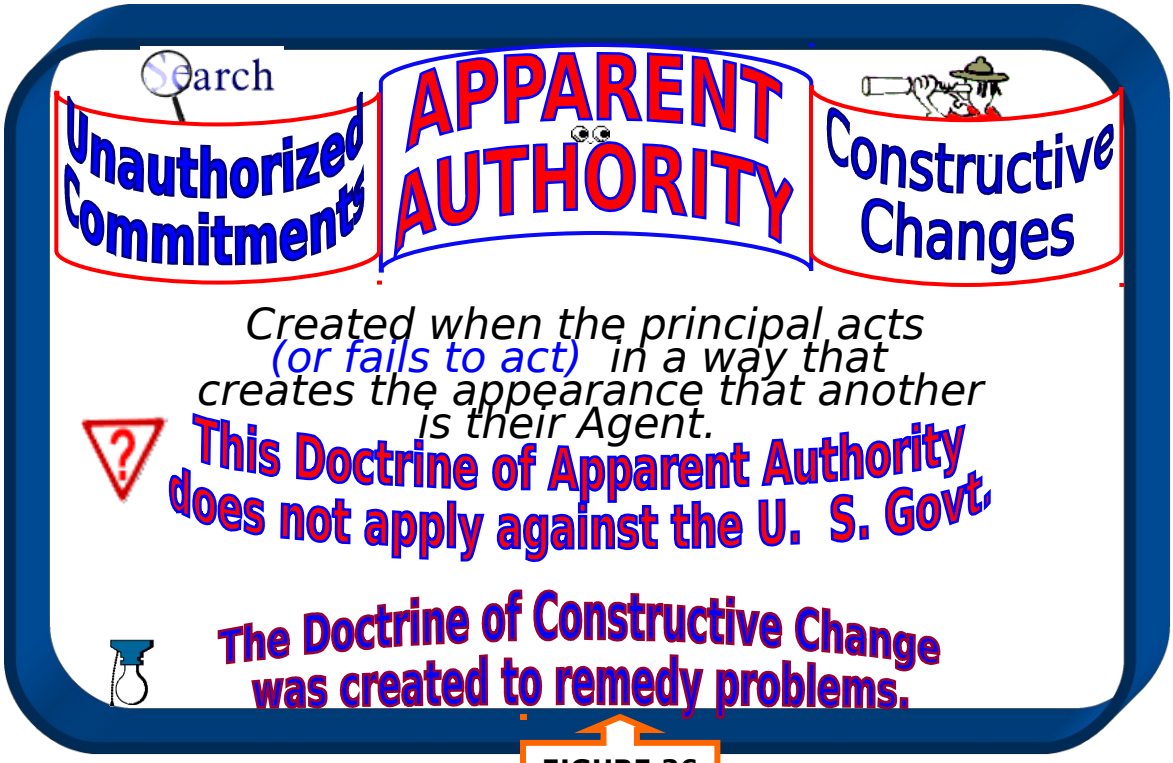

Search
Unauthorized Commitments
APPARENT AUTHORITY
Constructive Changes
Created when the principal acts (or fails to act) in a way that creates the appearance that another is their Agent.
This Doctrine of Apparent Authority does not apply against the U. S. Govt.
The Doctrine of Constructive Change was created to remedy problems.

FIGURE 36

1. Unauthorized Commitments (UC)

a. Definition **(FAR 1.602-3(a): "...an agreement that is not binding solely because the U. S. Government representative who made it lacked the authority to enter into that agreement on behalf of the U. S. Government." This means that everything else about the transaction would have been legal, except that the individual who performed the unauthorized action lacked authority to obligate the U. S. Government. Since no contract exists the U. S. Government must decide whether there is legal basis and rationale to create a contract after the fact.**

b. Contracting officers are the ones authorized to contract for the U. S. Government's needs. They have the authority to obligate the U. S. Government for the expenditure of funds. CORs are not contracting officers, and do not have authority to contract for the U. S. Government's business. Most unauthorized commitments result from U. S. Government employees not understanding acquisition authority delegation/designation.

c. Most unauthorized commitments result from apparent authority. As discussed in an earlier segment, apparent authority is when a U. S. Government employee appears to a contractor to have authority

Ratification

1. Is the subsequent adoption of an **Unauthorized Act:**
   a. When the Principal accepts liability of act.
   b. It is retroactive to the occurrence date.

2. When in the best interest of the Government, ***unauthorized actions may be ratified if it's legal, but, it is not automati***

3. ***Unauthorized Commitments and Constructive Changes*** generally result from ***Apparent Authority.***

FIGURE 37

2. Ratification

a. Even if agents have no actual or apparent authority to act for a principal they may purport to act for the principal. *Unless the principal adopts, acknowledges, or ratifies such acts, the principal cannot be held liable for the act*.

b. Ratification is the subsequent adoption of an unauthorized act. By ratifying the act, the principal becomes liable for the act. The ratification reverts back and becomes effective as of the time the unauthorized act was originally performed by the agent or other Government employee. This is to say the ratification is approval after the fact, retroactive back to the date of occurrence so the company that provided the supply, service, or construction, can be paid entitlements from the beginning of performance.

c. The ratification process may also be used by the U. S. Government to validate certain unauthorized transactions by its agents or other U. S. Government employees, when it is in the best interest of the Government to do so. The ratification, is not automatic. The U. S. Government may or may not ratify unauthorized acts. FAR 1.602-3(b) defines the policy and criteria under which ratifications can be made. If an unauthorized action does not comply with the elements of this criteria, the action will not be legally ratifiable. This authority cannot be created after the fact.

d. Ratifications procedures vary with the different services. Generally, the circumstances of the unauthorized act must be investigated and a file developed. Once the investigation is completed and the proper corrective actions taken by commanders, it is reviewed by a contracting officer and legal counsel. If their recommendations are in favor of approving ratifications, the files are forwarded to the ratifying official for a final decision on whether they will be ratified. If the

23. Constructive Changes

a. This subject is discussed here, as constructive changes are, in reality, unauthorized actions, generally resulting from apparent authority. Constructive changes differ from unauthorized commitments in that they arise out of or are related to contracts. As stated previously, unauthorized commitments are when no contract exists. Constructive changes can generally be settled through the contract terms and conditions (Disputes Clause). Constructive changes are one of the greatest causes of contractor claims and mission impairment, so we will continue to delve more into causes and avoidances in subsequent learning segments.

b. Definition: **The supreme court has clearly stated what is a constructive change. It is an informal request for additional work or services caused by some act, *or some omission to act*, on the part of the U. S. Government that causes a contractor to change the way they perform the contract from what Is expressly stated in the terms and conditions of the contract. The legal definition of the word "constructive", based on interpretation, is "indirectly expressed", so, the literal legal definition of constructive change would be an indirectly expressed change, or an informal change.**

c. Formulation of the Constructive Change Doctrine

(1) The doctrine was conceived by the Armed Services Board of Contract Appeals (ASBCA) with the interest of both parties in mind. Both the contractor and the U. S. Government benefit by the use of this concept. It is relatively obvious how contractors benefit from this doctrine. It allows them to be compensated for work performed outside the original terms of the contract. Basic fairness or equity, is the issue.

(2) The U. S. Government benefits from the use of this doctrine in a different way. As discussed in an earlier block, the "apparent authority rule" stated that the Government is not liable for the unauthorized acts of its agents (*Federal Corp. Insurance Corp. vs. Merrill, 332 U.S.380*). The precedent established by this landmark case was rather harsh and had an inhibiting effect on contractors. At this time, if a contractor received an "informal change order" they could perform, with the possibility of not getting an equitable adjustment. In this event, their only recourse would be to stop work and sue the U. S. Government for "breach of contract". The other alternative to the contractor would be to refuse to perform the work changed, creating a possible

(5) Since its inception, the scope of the constructive change concept has grown. Perhaps the best way to appreciate the magnitude of the Constructive Change Doctrine is to look at some examples of common causes of claims:

(a) informal requests

(b) defective specifications

(c) ambiguous specifications

(d) Refusal to clarify specifications

(e) U. S. Government provided studies and cost estimates

(f) geographical changes

(g) excessive or erroneous U. S. Government inspection

(h) defective U. S. Government Furnished Property (GFP)

(i) Acceleration of performance without consideration to contractors

d. What is <u>NOT</u> a constructive change. From this discussion you may have concluded that the contractor may be due compensation for any changed circumstances. This is not entirely true. The U. S. Government takes precautions to ensure contractors know who has authority under the contract (contractors receive copies of CORs designations of authority, and authority is discussed at the post-award conference as will be discussed in a later learning segment). Contracting officers consider this in evaluating claims for equitable adjustments for claimed constructive changes.

e. Mere suggestions are not constructive changes. Changes made voluntarily by the contractor are not constructive changes. These two examples are nebulous. yet, represent two of the greatest disagreements related to constructive changes. Did one party through some word, action or inaction cause the other party to believe they had acceptance of a suggestion, or was it a voluntary change not caused by actions of a U. S. Government employee? Suggestions and voluntary actions are difficult to isolate and generally should be avoided.

f. Constructive changes have grown to be one of the most severe of all problems in administering contracts. Many efforts have been made to avoid or negate their occurrence. Examples of this are the Notifications of Changes Clause (FAR 52.243.7) for research and development (R&D) and supply contracts, and a variety of clauses written into the Special Contract Requirements section of the contract. Basically these clauses call for the contractor to take directions from specified personnel. In the event unauthorized changes are made, the

4. SUMMARY

a. The Contracting Officer and CORs are "special agents" of the U. S. Government with limited authority to bind the U. S. Government with contractors.

b. Contractors perform contracts exercising independent employment, according to their own methods without being subject to controls of the U. S. Government, except as to results of work.

c. A personal services contract is characterized by the employer-employee relationship it creates between the U. S. Government and a contractor's personnel. Agencies shall not award personal services contracts unless specifically authorized by statute. CORs, QARs, and inspectors shall not by their actions administer non-personal services contracts in a manner that converts them into personal services contracts.

d. There are two types of *actual or real authority*: "express(ed)" or written, is in general terms; "implied" is incidental to the express authority which would be usual, customary or necessary to the authority granted, in accordance with general custom. Authority by operation of law is when the law or the courts create authority.

e. Though apparent authority may provide the basis for deciding claims for equitable [illegible] is not an [illegible] relying on the appearance of authority by a U. S. Government employee, and has injury, the ratifying official may consider accepting responsibility and legal [illegible] determined. Ratification in the [illegible] unauthorized commitments, is creation of a contract, retroactive to the date of the [illegible] constructive changes is by modification to settle dispute under the Changes Clause [illegible] or to which it was related.

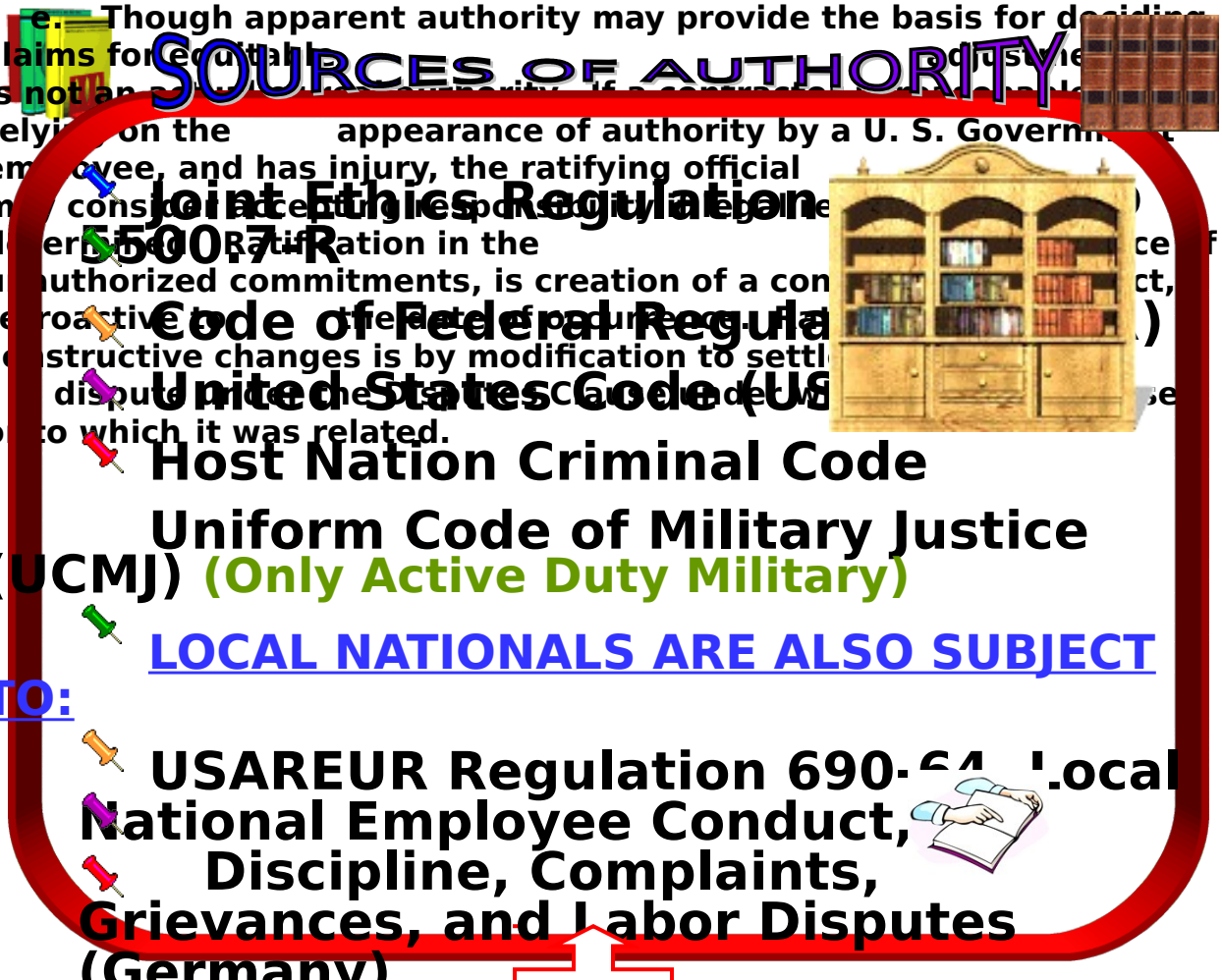

SOURCES OF AUTHORITY
Joint Ethics Regulation (JER) 5500.7-R
Code of Federal Regulations (CFR)
United States Code (USC)
Host Nation Criminal Code
Uniform Code of Military Justice (UCMJ) (Only Active Duty Military)
LOCAL NATIONALS ARE ALSO SUBJECT TO:
USAREUR Regulation 690-64, Local National Employee Conduct, Discipline, Complaints, Grievances, and Labor Disputes (Germany)

FIGURE 38